

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUELS BROS. & COMPANY
(a corporation),

Appellant,

vs.

THE HOSTETTER COMPANY
(a corporation),

Appellee.

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Appellant's Supplemental Brief.

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No. 788.

APPELLANT'S SUPPLEMENTAL BRIEF.

Supplementing the oral argument which was made in this case, and in reply to the brief submitted by appellee, we wish to call the attention of the Court to certain matters which have not heretofore received the attention which they deserve, and which the importance of the questions here involved merits.

The more we consider this case, the more firmly are we convinced that the appellant is entitled to a reversal.

Evidence of Fraud.

The meager evidence of the appellee on all the issues involved and the total absence of any showing by complainant of any evidence of fraud on the part of

the appellant, while the burden to show fraud was irresistibly upon the complainant, makes the complainant's case an exceedingly weak one.

It will be remembered that all the evidence by which fraud was sought to be shown was adduced by two hired spies, paid by the appellee to secure evidence, at so much per day. If they did not secure evidence, they did not earn their money, and it is no wonder that under such circumstances they secured, or at least produced the evidence.

The gravamen of appellee's contention is that when an intending purchaser of Hostetter's Bitters entered appellant's store, instead of giving him Hostetter's Bitters, manufactured by the Hostetter Company, appellant gave him other Bitters, representing it to be appellee's Bitters, and suggesting that the purchaser sell it as and for appellee's Bitters. There is no such evidence. The appellant, when first approached for Hostetter's Bitters, set out the genuine Hostetter's Bitters in bottles. If there had been any attempt on the part of the appellant to run appellee's goods out of the market, the appellant's own goods would invariably have been first set forth; but in not one instance was this the case. The genuine goods were always produced, and it was not until these spies, in their mad desire to secure evidence, objected to the price, suggested bulk Bitters, asked for an empty bottle, and purposely and detestably trapped the appellant into producing bulk Bitters in order to manufacture evidence, that any sale was made. There is no proof of a single sale to any bona fide purchaser of any but the

Hostetter's Bitters manufactured by appellee. The spies never wanted these Bitters. They admitted in their testimony that they did not; they came for bulk Bitters, and for bulk Bitters only. Evidence of sales to these spies is the only evidence introduced. There is not a hint that appellee ever heard that the appellant was unfairly competing with appellee. There is not a scintilla of evidence that appellant ever tried to induce a bona fide purchaser to take any other Bitters than appellee's Bitters. Cases are cited in our Opening Brief showing that the testimony of these spies is to be received with extreme caution, and when we remember that they lied to appellant, giving the name Hatch instead of their own names (Tr. pp. 182, 588), and saying they had broken the bottle, which they had not (Tr. pp. 199, 200), it is fair to deny that they told the truth to the examiner. It will be remembered that appellee's counsel stated in open court that one of these spies was "in California " for his health". Why not give him Hostetter's Bitters instead of climate? Probably his hard swearing on the eastern circuits had made him ill.

Appellee Suggested Fraud.

Every act of the appellant which the appellee has cited as fraudulent took place at the direct instance and request of the appellee's agents.

These requests of the appellee to do these acts amounted to an express license to appellant to do them, and having caused the acts to be committed, having brought them about solely through its own scheming, it cannot now be heard to complain of them, nor to take

advantage of its own wrong.

We trust that the irresistible force of this position will appeal to the Court, and are certain that the decisions cited in our Opening Brief to support it amply justify our faith in the position.

It would seem enough to prejudice appellee's case that the local evidence was gained entirely by spies; that one of the two was temporarily in the employ of Redington & Co., the local distributor of the appellee, until just after the trial, so as to give him a sort of prestige as being connected with the direct trade, and also to keep his testimony in line; while immediately after the trial he was discharged, and has not since been with that company.

Appellee's Fraudulent Depositions.

But there is another and still more damaging matter connected with this case, and with all the other cases tried with it in the Circuit Court; that is, in connection with the opening depositions taken by the appellee in Pittsburg, an argument against which is contained in our Opening Brief, pages 7 to 12, the depositions themselves being set out in the Transcript, pages 30 to 105. It appears that in 10 different cases pending in the lower Court, and numbered 12779, 12780, 12785, 12786, 12788, 12789, 12790, 12791, 12792 and 12793, depositions were taken by appellee of the same witnesses, by the same officer and conducted by the same counsel, at the hour of 10 o'clock A. M. on October 9th, 1899; that these depositions are fac similes and many are even carbon copies; there was not even a change in the punctuation marks.

On December 18th, 1899, depositions numbered 12782, 12783, 12784, 12786, 12787, 12790 and 12791 were taken at 10 o'clock A. M.; exactly the same witnesses were examined before the same officer and by the same counsel in each of said causes, and all at the same minute of time. The examining officer and the witnesses charged full rates for their services in each one of the cases, and the depositions taken on this date are all in *haec verba* as the depositions taken on October 9th. Ten depositions going on at the same minute on October 9th, 1899; seven depositions at the same minute on December 18th, 1899! and yet counsel put these forth as fairly taken in each case.

What does this mean? Simply that when the hour for taking depositions arrived, and the defendants did not appear, counsel took from a musty pigeon-hole one of the depositions taken in the numerous manufactured cases which appellee has conducted by way of advertising (*Hostetter vs. Brunn*, 107 Fed. 707), gave it to his typewritist, and had him make sufficient copies of it to make one deposition for each case pending. Several carbons were made to each original, and spaces were left for the names of the various defendants in each action, and these were afterward written.

The effrontery and temerity of counsel in introducing to a Federal Court of Equity such a palpable fraud as these depositions, and expecting to use them as evidence is as serious a breach of professional etiquette and candor, nay, of the duties of an attorney, as it is a failure of evidence.

Time and again throughout the proceedings, the at-

tention of the counsel has been called to these carbon copies and an explanation requested, but none has been forthcoming.

In Appellee's Brief (Mr. Clarke's Statement, p. 5) speaking of our opposition to these depositions at the trial, it is said, "The writer was taken by surprise and "unable to explain." Why could he not explain? Wasn't he there as he purported to be? And why does he not explain now? He simply can't explain. Such proceedings are unexplainable. Why didn't he explain during the oral argument before this Court.

The continuation of one deposition for a number of days after the time set for the taking of it was referred to in our Opening Brief and in the argument; counsel in reply said that this was done because the notice was rather short, and that it was an accommodation to us in order to give us more time; but where was the notice to us of the continuance? We have looked through the records in vain for one; we have never had one through the mails; there was no notice to us at all, and we know that none was given; yet counsel has the audacity to say that this was done as an accommodation to us; as a matter of fact, it was done, if at all, as an accommodation to him; and now that he knows that it was done without any authority of law, he states that it was for our accommodation, and that we can't complain. Such specious arguments are not convincing.

We feel confident that the Court will suppress these depositions, and that the case will fall for lack of any evidence upon the points they purport to cover.

**Complainant has no exclusive right to use the word
"Hostetter".**

We come now to consider the evidence contained in these so called depositions on appellee's exclusive right to use the word "Hostetter" as applied to Bitters. There is no sufficient showing that the Hostetter Co. ever acquired from the estate of David Hostetter, deceased, the exclusive or any right of manufacture of the Bitters. There is an alleged bill of sale by a purported administrator. But there is no showing that this man was an administrator and there is no order confirming sale.

We have not thought it necessary for us to demonstrate to the Court that the laws of Pennsylvania require a confirmation of sale of personal property. If they do not require such a confirmation, it was the duty of opposing counsel to call our attention and the Court's attention to the fact when this point was made in our brief and in the oral argument; the burden was on counsel, and even though this Court might take judicial notice of the law of Pennsylvania to the extent of not requiring it to be pleaded; still, when counsel, familiar with that law, fail to quote it to the Court, the Court must conclude that it is the same as the law of this state. Were this not enough, we could go on to show that there is no testimony in the case to show that Dr. Hostetter ever had the exclusive right of manufacture, that Dr. Hostetter ever died, that his estate was ever probated, that any personal representative was ever appointed, that D. Herbert Hostetter, who signs the agreement of sale, ever was an administrator, or had

any interest in the alleged decedent's personalty (See Tr. pp. 32, 33, 49-52, 67, 68, 76-79, 543-546).

More than this, we are told on pages 32 and 51 of the Transcript, and in the early cases of *Hostetter & Smith vs. Adams*, 10 Fed. 838, that Dr. Hostetter never had the exclusive right of manufacture; that he shared it with one M. L. Myers and with Smith. Robb says (Tr. p. 51) that Myers had no monetary interest, and that he acquiesced in the conveyance. Acquiesced? There is no evidence of it. He didn't sign the agreement of sale. And he must have had some rights.

And then Smith, where is he? The same attorney who now appears for complainant thought it necessary to join Smith with Hostetter in the suit of *Hostetter & Smith vs. Adams*, 10 Fed. 841. Now he has forgotten all about him. Perhaps, unintentionally, counsel has furnished us with the precise evidence about Smith we require. In the deposition of Crooks (Tr. pp. 43 and 44) we read:

“Q. Under whose proprietorship was the manufacture of these stomach bitters conducted when you first went there?”

“A. Hostetter & Smith.

“Q. And Mr. Smith died?”

“A. Yes, sir.

“Q. And then Mr. Hostetter?”

“A. Yes, sir.

“Q. And the present proprietors are the heirs at law of Mr. Hostetter, are they?”

“A. As far as I know, yes, sir.”

According to this testimony, Hostetter & Smith were

joint proprietors of the right of manufacture. And Smith died.

Worse than the failure to show that Dr. Hostetter ever had an exclusive right of manufacture, complainant shows affirmatively that he never had an exclusive right. Counsel thought it necessary to such succession to the title of one Hostetter after his death, and, upon the trial, when the evidence was shown to be insufficient, got permission to introduce a copy of the bill of sale after the cause had been submitted. Isn't it just as necessary to show what became of Smith's title? and Myers' title?

We earnestly submit that the Court will not tolerate such looseness. Exclusive right to a formula, a label, a trademark must be affirmatively shown and any outstanding title which may appear will defeat recovery.

Where exclusive use is denied, it must be proven.

Ultra Marine Blue Case, 102 Fed. 551, 552.

In *Lorillard vs. Peper*, 65 Fed. 597, complainant alleged succession to his predecessor, and when he failed to prove the succession, claimed that it appeared inferentially from the evidence. The Court said:

"There is no evidence in the record that P. Lorillard & Co. sold, assigned, or transferred their business of manufacturing tobacco or trade-marks to the complainant in this case. If they did, the fact is susceptible of direct and unequivocal proof; and the complainant having failed to furnish it, and relying merely upon incidental and accidental expressions of witnesses, it will be presumed that the fact averred in the bill is not true; and for this reason the bill will be dismissed, at complainant's cost."

On page 260 of *Hopkins on Unfair Trade* it is said:

“The courts have refused to grant the preliminary injunction where it appeared probable that the plaintiff had never acquired the exclusive right to use the mark, but held it as a tenant in common with another.” Citing

Am. Cereal Co. vs. Eli Pettijohn Cereal Co., 76 Fed. 372.

In the case cited the Court of Appeals said:

“It is left doubtful by the evidence whether the father ever parted with his right to such use of that name, and whether the son acquired the exclusive use thereof, and whether they were not both entitled to such use of it as tenants in common, so to speak. The rights being thus clouded with doubt, it was no abuse of discretion to dissolve the injunction.”

Only a few days ago, in the case of *Martini vs. Sarocca*, Circuit Court No. 12,893, Judge Morrow, of this circuit, dismissed the case on account of complainant's failure affirmatively to show title to a label to which they undoubtedly had title, and it is only, to our minds, because Judge Morrow overlooked this point in deciding this case, that our case failed to go off on the same ground. The fact that this point is not discussed in the opinion corroborates us.

“Hostetter” not susceptible of exclusive appropriation.

But there is another difficulty confronting appellee. It never could acquire the exclusive right to use the words “Hostetter's Bitters” nor any variation of them. The authorities and the argument confirming that point are sufficiently set forth in our Opening Brief, pp. 24, 25, 52-55. The error into which the trial Court fell upon this point arose from considering these words,

“Hostetter’s Bitters” as a trade name, not necessarily a valid trademark, but one, which, having been once used, would be protected from unfair use at the hands of a subsequent claimant by injunction denying him any rights at all in the name. There are any number of such cases; they are founded on sound law, and it is strange that the trial Court did not observe the line of demarcation between them and the case at bar. That it did not is evident from the opinion (Tr. pp. 555, 556) and from the decree (Tr. pp. 561, 562), which enjoined all use fair or unfair of the words “Hostetter’s Bitters”. The case at bar is controlled by such cases as those cited on pp. 24 and 25 of our Opening Brief.

In its Brief (p. 4) appellee makes no attempt to distinguish these cases, and its supercilious dismissal of them is such a palpable evasion of our argument that it is hardly worth commenting upon. The name Singer, as applied to sewing machines, describes a particular style of sewing machine and the Singer cases cited by us hold that any one can make this style of machine and call it by its right name, Singer, provided he represents it to have been made by himself. The Centaur cases hold that anyone can compound and vend Castoria, provided he says it is his own. And the cases of *Hostetter vs. Adams*, 10 Fed. 838, and *Hostetter vs. Fries*, 17 Fed. 620, long ago decided that the same was true of the word Hostetter.

There was never the slightest hint in our case that these Bitters were of other than local manufacture; there was no deception or holding out at all. Even where there has been unfair competition in the use of

these words, the Court can only enjoin against an unfair, not a fair use. When Dr. David Hostetter gave the Bitters to the public, he was compelled to give it a name, and it is complainant's misfortune, not its protection, that he used his own name. Anyone has the right to make the compound and to sell it, and may apply to it the name by which it was christened. The only restriction is that he must represent it to be made by himself. The appellants had a perfect right to sell "Hostetter's Bitters manufactured by Samuels Brothers", and there is not a case in the law books to the contrary. All that the trial Court, therefore, had jurisdiction to do, if it had that, was to enjoin the defendants from using the words in such a manner as to represent to the public that the Bitters they were selling were the Bitters of the complainant. But the injunction (p. 562) has restrained defendant from using, fairly as well as unfairly, lawfully as well as unlawfully, these words, which everyone is entitled to use. It is an absolute prohibition of the exercise of the plainest possible right.

Holzappel's Comp. Co. vs. Rahtjen's American Comp. Co., 22 U. S. Sup. Ct. Rep. 6.

We recognize the fact that a defendant in such an action as this comes into Court under a cloud, and that the tendency has been almost to presume him guilty until he is proven innocent. But such a defendant has some rights, and even when the Court becomes satisfied that he has dealt unfairly with the complainant, this will not so blind the judicial eye to his unquestioned rights that all shall be taken away by an omnibus injunction.

A fortiori is this true where a defendant, as in this case, has done no wrong at all, has treated no one unfairly. This point, even though it stood alone, we would confidently rely upon to secure a reversal.

**The alcohol in Hostetter's Bitters is disastrous in
the very diseases it is adver-
tised to cure.**

The directions in complainant's bottles of Bitters read as follows:

“ One wine-glassful taken three times a day, before
“ meals, will be a swift and certain cure for Dyspepsia,
“ Liver Complaint, and every species of Indigestion—
“ an unfailing remedy for Intermittent Fever, Fever
“ and Ague, and all kinds of periodical disorders—a
“ means of immediate relief in Flux, Colics, and Chol-
“ eraic maladies—a cure for Costiveness—a mild and
“ safe invigorant and corroborant for delicate females—
“ a good, anti-bilious, alterative and tonic preparation
“ for ordinary family purposes—a powerful recuperant
“ after the frame has been reduced and attenuated by
“ sickness—an excellent appetizer as well as a strength-
“ ener of the digestive forces—a depurative of the blood
“ and other fluids, desirable alike as a corrective and
“ mild cathartic, and an agreeable and wholesome stim-
“ ulant.

“ Persons in a debilitated state should commence by
“ taking small doses and increase with their strength.”

We call the Court's attention to the directions in the almanacs, which directions and the advice therein given

are even broader than the statements appearing on the labels.

We proved that the ordinary wineglass contained four ounces or more and to show how dangerous such an amount of Hostetter's Bitters would be to sufferers from the identical diseases it is advertised to cure on account of the large quantity of absolute alcohol the Bitters contains (almost one half) we introduced the most convincing testimony. We had the Bitters analyzed to determine the quantity of alcohol contained and then took the testimony of physicians of the first standing to show that these Bitters, containing this amount of alcohol, taken as prescribed, would be irreparably harmful in the very diseases which the decoction was advertised to cure. A brief summary of this evidence is as follows:

Dr. Falkenau's record showed thirty-four years' experience, during which he had constantly practiced chemistry, and a splendid foundation for his testimony was laid both on direct and cross examination. He testified to having analyzed a bottle of Hostetter's Bitters purchased from Wakelee & Co., druggists, with a view to ascertaining the amount of water, alcohol and fixed residue which it contained; that the result of this examination showed 44% alcohol; and in answer to the question, "How did you determine the presence of that alcohol?" he testified, "By distilling and measuring the amount of it and condensing the alcohol under proper precautions and determining the specific gravity of the distillate." He also found about 4% of fixed residue; and recognized the presence of vari-

ous flavoring substances, to-wit: sugar and bitters of various kinds.

On cross examination the witness further testified: " We always make several checks to be sure we make " correct tests. We distil several portions and compare " the results to see that they agree."

Mr. Tompkins, of the firm of J. M. Curtis & Son, 123 California street, also testified for the defendant. His experience was eight years, chiefly at the University of California, four and a half years as a professional. His analysis is in evidence as Defendant's Exhibit 3 (Tr. p. 528). This analysis shows 43 per cent of alcohol and 4.44 per cent of dry extract, being almost identical with the analysis of Mr. Falkenau. As the two were made independently, and as the subject of the analysis of such a compound is admittedly difficult, the similarity of results proves the accuracy of each.

Upon the trial Prof. Price was selected by the Court to make a further analysis as a check on the foregoing and on that of appellee's expert Mr. Wuth. Prof. Price's testimony is found in the Tr. pp. 535-541.

He found alcohol by weight 36.56%, by volume 43.56%, thus completely substantiating our experts.

Dr. Berndt, who studied in Berlin, Heidelberg, Leipsic and Breslau, and who is adjunct to the chair of therapeutics of the medical department of the University of California, testified as to the effect of alcohol on the human system. He stated that he had studied the subject of alcohol from the chemical libraries and

closely examined the general literature of people who had made a special study of the subject, that he was the lecturer of the college on the subject of alcohol. A synopsis of his testimony is as follows:

The effect of alcohol on the normal stomach, if kept up for any length of time, results in a chronic inflammation of the mucous membrane of the stomach; or, if taken in large doses, an acute inflammatory process and stimulation and irritant to the mucous membrane. Taken on an empty stomach, it increased the amount of the gastric juices. It is the most powerful stimulant to the secretion of gastric juice we know of. Experiments have been made on dogs, producing a gastric fistula, an artificial opening, and then administering alcohol. Immediately after the administration of alcohol the gastric juice will spurt out of this fistula.

Alcohol is liable to set up a chronic inflammatory process in the liver,—liable to produce what we call cirrhosis of the liver, or contracted liver, a common disease of the liver. It has a distinct tendency to destroy more or less liver cells and produce an increase of the connective tissues wherein the inflammatory process destroys certain cells and connective tissues and contraction will take place.

The effect is very similar on the normal kidneys. It produces fatty degeneration of the kidneys.

On the heart alcohol will first have a stimulating effect and if this stimulation is kept up for any length of time, it is liable to have a depressing effect on the heart, producing more or less muscular weakness, pro-

ducing what we call dilatation or general weakness of the heart. In small doses taken occasionally, it will increase the beating of the heart considerably.

Alcohol is a powerful depressant to the nervous system, if kept up for any length of time, and will also produce these changes in the nervous structure itself, causing chronic inflammatory processes and may destroy normal cells.

A wineglass of liquor 43 per cent of which is absolute alcohol, taken three times a day before meals, contains such a quantity of alcohol as is liable to produce the effects which I have stated on the different organs if this process were continued for quite a length of time. Medicinally when we speak of a wineglass we generally mean a glass containing about four ounces, eight tablespoonfuls. Of course wineglasses are of different sizes. In my house we have different kinds. Medicinally, generally we speak of a wineglass of about four ounces, containing eight tablespoonfuls. I think the ordinary wineglass commonly encountered would cover about the same amount. I have seen a wineglass that would hold a good deal more than this, and may have seen some that would hold less, but we, as physicians, mean a glass that contains about four ounces, eight tablespoonfuls. That is, I think, a rather small glass. If an ordinary person were told to take a wineglass full of liquor daily before his meals, he would probably take about twelve ounces.

Indigestion and dyspepsia in their popular sense are generally caused by over drinking and overeating. By over drinking I mean some stimulants. It might be

an alcoholic stimulant, it might be tea or coffee, some kind of stimulating drink. A wineglassful of liquor, 43 or 44 per cent of which is absolute alcohol, taken three times a day before meals, would be very likely to cause these disorders. If Hostetter's Bitters contains the amount of alcohol as has been stated it is very likely to cause such disorders. Some of the most frequent cases of liver complaint are from over drinking, taking stimulants, and over eating. The same testimony I have given as to the effect of Hostetter's Bitters on indigestion and dyspepsia would apply to liver complaint, kidney troubles, and bladder troubles. I would forbid any alcoholic stimulant for a patient suffering from liver complaint, I would forbid so small a quantity of Hostetter's Bitters as a wineglassful three times a day on an empty stomach. I would make the same injunction against the use of alcohol. In cases of kidney trouble we generally put a patient on a mild diet, absolutely non-stimulating diet. In bladder trouble we forbid stimulants, because they irritate the mucous membrane. We forbid the use of alcohol in rheumatism and in gout. Gout is often produced by heavy alcoholic stimulants. Alcohol is given as one of the causes of gout and given as one of the causes of rheumatism. I do not mean to say that all who have rheumatism get it from alcoholic drinks. Alcohol is very quickly absorbed when taken on an empty stomach. Alcohol produces a burning sensation of the stomach, caused by the irritant properties. I should instruct a patient to avoid it before meals altogether. The effect of Hostetter's Bit-

ters taken before meals would be rather more deleterious on account of the irritating qualities that it has on the mucous membrane of the stomach. The taking of alcohol almost always stimulates a desire for more, any stimulant as a rule, always produces a craving for more. A wineglassful of whisky taken three times a day before meals is liable to produce an appetite for more. The same is true of Hostetter's Bitters. I think it would also be liable to produce an appetite for other alcoholic stimulants. The Doctor testified that such a decoction as was described in the Curtis analysis would be called by him an alcoholic stimulant. If it contains the amount of alcohol suggested it would produce intoxication if taken in sufficient quantities.

“ Q. 75. Is it possible to doctor or compound alcohol by a small percentage of chemicals or other drugs so as to prevent its effect as an alcoholic stimulant?”

“ A. No.”

Dr. Golding in rebuttal, in answer to direct interrogatory 28 said: “ It is possible to compound alcohol by a small percentage of chemicals or other drugs so as to prevent its effect as an alcoholic stimulant, for example, paregoric, or camphorated tincture of opium. That tincture is made with a hydro alcoholic menstruum and contains four drams of powdered opium per liter. Percentage by volume will correspond with four-tenths of the opium, and it is the opium effect that you get from the administration of that preparation and not the alcoholic effect.”

The disingenuous and worthless character of this

testimony is evidenced from the fact that there is no mention of the amount of alcohol, nor the size of the dose. Of course so small a dose may be given that the effect of the alcohol will not be noticeable, but the presence of the drug in the alcohol does not counteract the effect of the alcohol, and if enough alcohol were given the effect would necessarily still be present. We have never heard of an antidote for alcohol.

In tincture of paregoric so much of the drug is present that if enough alcohol were given to get conditions analogous to Hostetter's Bitters, the amount of opium present would kill the patient. Opium is a poison. We certainly admit that it would be possible to put enough poison into a wineglassful of alcohol to kill any man, but this doesn't show that the poison antidotes the alcohol.

Dr. Berndt further testified: In disease, alcohol is unsafe to be taken except on the advice of a physician. Alcohol is a medicine in certain diseases. In all those very depressing diseases and in losing diseases, where the strength of the patient is wasting away, for instance, typhoid fever, we give alcohol. When we need some quick stimulant we use alcohol. We rarely give it except in an atonic condition—in a condition where there is any amount of strength it is contra-indicated. Hostetter's Bitters are not known to the medical profession as a medicine. I think the effect of alcohol is worse on a woman than on a man because of the nervous system of the woman. She has not the power of resistance of the man. She is more apt to lose self control, and loss of self control is superinduced by

alcoholic stimulants.

In "Diseases of Women" by Dr. Geo. E. Herman of the London Hospital, published in 1898, the author says, p. 100, speaking of Chronic Metritis, or Inflammation of the Uterus:

"Forbid alcohol. So far as it has any effect on the pelvic organs, this effect is to aggravate pelvic congestion. But in patients with weak digestion a little wine with meals may do more good by helping digestion than it does harm by increasing pelvic congestion. But only prescribe it if there is a clear indication for it and prescribe the exact quantity that the patient is to take."

Dr. J. M. Williamson, who held two chairs in the medical department of the University of California, and was President of the Board of Health in this city, also testified for the defendant:

The effect of alcohol on the normal stomach would be first to produce what is known as hyperaemia. That may be defined as an increased flow of the blood to the parts. If you rub the hand it becomes reddened in a few minutes. The circulation from the stomach passes through the liver. Alcohol, when taken into the stomach, goes through the stomach and into the liver. It also produces hyperaemia of the liver, primarily the early stage of the hyperaemia. Cirrhosis is a later condition, and this, if kept up, would result in inflammation. That requires time. That is of chronic character and is accompanied by a shrinkage of the tissues so that the liver becomes hardened, and this condition is known as cirrhosis.

Will you tell us the influence or effect of alcohol on

the kidneys, bladder and heart?

A. On the kidneys; we have primarily the same effect as in the liver only to some lesser degree. The blood carrying the alcohol filtering through the kidneys produces this hyperaemia, which if continued, or rather sufficiently often repeated, will gradually set up an inflammatory condition, a shrinkage of the kidney, and what is known as cirrhosis, or called by some "contracted" or "drunkard's kidney". Cirrhosis of the liver is known as "drunkard's liver", "hob-nail liver", and "gin-drinker's liver".

Q. What is the effect on the normal bladder?

A. Mostly the same effect. Urine carries alcohol with it in order to discharge it from the system, and if there should be a sufficient amount of alcohol in the urine it would cause hyperaemia of the bladder, but not much, because the bladder is a sac containing about from one to two pints of water—the average bladder—we don't need to be particularly accurate of measurements there—the amount of the dilution of the alcohol would be so great that there would be no appreciable effect on the health of the normal bladder.

What is the effect on the normal heart?

A. The effect on the normal heart is stimulating. Alcohol stimulates the nerve centers of the heart; and increases the action of the heart; and there is a rapidity of beat and intensity of beat; the pulse beat becomes more rapid and firm, showing greater impulse behind the blood current.

Q. 19. Any reaction of the heart?

A. As the effect of the alcohol passes off there is a

slowing down till it reaches the normal. If the heart is kept constantly stimulated by the use of alcohol after a while it may become functionally deranged; that is, it would be subject to periodical fits, where it would beat more rapidly than usual and then more slowly than usual.

Q. 20. Would that have any effect on the normal nervous system?

A. You refer now to the action of the heart?

Q. 21. Yes; or this action of the heart caused by alcoholic stimulation.

A. There is usually a certain amount of exhilaration the heart acting more vigorously and the blood current necessarily forced a little further. The circulation is more active in what we call the periphery, the ultimate distribution of the blood current; and on the brain more or less exciting.

Q. 22. Is alcohol quickly absorbed by the human system?

A. Yes.

Q. 23. About how long does it take an empty stomach to absorb a quantity of alcohol, say, an ordinary wineglassful?

A. I cannot give you the exact figures, but would say within a very few minutes because it is noticeable on the breath and also detected in the urine within a very few minutes.

Q. 24. Within a very few minutes it is distributed all through the system?

A. Yes.

Q. 25. Would food taken within a minute or two after a wineglassful of alcohol have any effect on re-

ducing the condition caused by the alcohol?

A. You mean in modifying the effect of the alcohol upon the stomach or the effect on the absorption?

Q. 26. In both ways?

A. It would depend upon the interval.

Q. 27. Say a couple of minutes?

A. It might to a certain extent interfere with the absorption of the alcohol. For instance, a man will go in and take a drink and then walk over to the lunch counter and eat a cracker. That might get the alcohol mixed up with the food, and it would not be absorbed so quickly.

Q. 28. That would be the only effect, it would not be absorbed by the system so quickly?

A. That is all; would not affect the immediate result on the mucous membrane?

Q. 29. But the mucous membrane would be affected immediately?

A. Yes.

Q. 30. That is, almost instantaneous?

A. Yes.

Q. 31. What is the effect on the human system taking a wineglassful of liquor of which the percentage is about forty-three or forty-four of alcohol, and about fifty per cent water, and four or five per cent dry extract, consisting of invert sugar, cane sugar, a small quantity of ash, a free acid, albuminoids and some wormwood?

A. You want to know the effect of this upon the stomach?

Q. 32. Yes sir; the general physical organism.

A. I would base my answer principally upon know-

ing the amount of alcohol contained. The sugar cuts very little figure here, except that of sweetening. As to the ash the original weight is not mentioned. The free acid is not to be considered, neither the albuminoids or others matters—all in small quantity. The coloring matter is evidently in sufficiently small quantities not to prove a noxious agent. As I said before I would base my answer almost entirely on the fact that it contains alcohol. The effect—that would be the same as that of drinking a glass of whisky or brandy. The average whisky or brandy—bar whisky or brandy—contains from forty-eight to fifty-five or six per cent of alcohol. It would cause hyperaemia; a pouring out of the secretion of the stomach in greater quantities than under ordinary conditions; and no doubt a feeling of exhilaration and increased circulation.

Q. 33. Speaking as you are of the different elements you are referring to the analysis made by J. M. Curtis & Son, are you not?

A. Yes, sir; looking at this paper. (Indicating Defendant's Exhibit No. 3.)

Q. 34. Looking at Exhibit No. 3?

A. Yes, sir.

Q. 35. So that taking that analysis as a basis for the answer is there any difference in the effect on the human system, between taking a wineglassful of the liquor as analyzed and an ordinary wineglassful of whisky or brandy?

A. No, sir; except that this might cater more strongly to the palate. There are some people who dislike the taste of whisky who might prefer this as a medium for taking in alcohol for the reason that cer.

tain volatile principles and flavoring matter, or either, would make it more acceptable to the taste.

Q. 36. What would you say a liquor the component parts of which are shown by the analysis in exhibit No. 3 to be, an alcoholic stimulant?

A. Undoubtedly.

Q. 37. Simply an alcoholic stimulant?

A. Yes.

I would not prescribe alcohol for dyspepsia for the reason that dyspepsia is usually due to a catarrhal condition of the stomach, and alcohol introduced into the stomach would only aggravate the condition already existing.

Q. 44. How would that affect a person with liver complaint?

A. The term "liver complaint" is subject to modification. It is a sort of a blanket. It might include acute or chronic inflammation of the liver—in fact any disordered condition of the liver. I prefer the question qualified to a certain extent. We do not recognize in medicine the term liver complaint.

Q. 45. What I really am attempting to get at is the advertisement of the Hostetter's Celebrated Stomach Bitters, and that that bitters, as shown by the analysis, is given for liver complaint, without designating what particular kind of complaint of the liver?

A. That is a pretty old preparation. I suppose at the time it was produced it may be said that liver complaint may have been an acceptable term. I think I can answer your question. I have already mentioned what its effect is on the healthy liver certainly if it had that effect on a healthy liver, on a congested liver it

would only aggravate it; if in a state of acute inflammatory condition it would irritate it, and in a chronic condition by passing through the blood vessels of the liver, it would make it worse than before. I would consider it absolutely contra-indicated in any diseased condition of the liver with this exception; that if the patient is in a very badly prostrated condition and needed to be kept alive for any definite purpose—for instance, we sometimes have to keep a patient going for weeks on stimulants, simply because the patient himself hates to die or because his friends want to save him—we keep up this stimulation notwithstanding he would die of a diseased liver—we pour it into him a long time, knowing that sooner or later he would come to a finish.

Q. 46. That is, where the case is hopeless, and you are simply delaying the result?

A. Yes.

Q. 52. Would or would not a wineglassfull of liquor containing the amount of alcohol as shown in the analysis, Exhibit 3, with the dry extract there shown, and the balance water, taken three times a day before meals, be a good remedy or cure for dyspepsia?

A. No.

Q. 53. Or liver complaint?

A. No.

Q. 54. Or indigestion?

A. No.

Q. 55. Or rheumatism?

A. No.

Q. 56. Or for gout?

A. Certainly not.

Q. 57. Or for bladder or uterine weakness?

A. No.

Q. 58. For constipation?

A. Might be enough wormwood to cause activity of the bowels; but that amount of alcohol is not advisable for use in cases of constipation.

Q. 59. Would such a quantity of liquor be a serious detriment to the system if taken three times a day before meals in a wineglassful at one dose?

A. In any one of the conditions just enumerated?

Q. 60. Yes.

A. Generally speaking, I say yes. There might be exceptions, though, as noted before—adynamic diseases.

Q. 70. Would a patient be more benefited by the use of the wormwood without alcohol than he would with it?

A. If I were giving a bitters, whether wormwood or quassia or gentian, or any recognized bitters, I would prefer to give it in some other form than alcoholic.

Q. 71. Why?

A. For the reason that unless the indication absolutely demanded I would not care to give my patient alcohol.

Q. 81. Would an article containing forty-three per cent of alcohol, and about fifty per cent of water, and dry extracts as shown in the analysis, Exhibit No. 3, if taken in doses of a wineglassful three times a day before meals have a tendency to create an appetite for larger quantities of such bitters or compound?

A. It depends on the individual. In a majority of cases I would say yes.

Q. 82. Some individuals have a strong will and would not be affected by it?

A. Yes; others absolutely uncontrollable.

Q. 87. Would there be any difference in the system toward increasing the appetite for liquor between taking a drink concocted as herein designated as bitters and taking an ordinary drink of whisky?

A. Yes, I would think so, because it is more palatable. The fact that the bitters is in there increases the flow of saliva and the gastric juice and temporarily creates an appetite. A person addicted to its use would find it necessary to put down three or four ounces of alcohol to pour out the gastric juice and that would make a craving for it instead of for food.

Q. 88. The effect would be more detrimental to the system taking Hostetter's Bitters three times a day before meals than taking whisky?

A. Yes; I think a man would drop his whisky more readily than his bitters.

To contradict this very strong and direct testimony, complainant introduced the testimony of various eastern witnesses whose depositions were taken under *dedimus potestatum* issued by the lower Court, against our objection. There was no showing that complainant could not obtain testimony here and hence no occasion for going outside of this jurisdiction. It was error to allow the introduction of this evidence, and the depositions should be suppressed.

The evidence, however, is of such a weak, intangible nature as to be wholly ineffective against the clear, concise, convincing testimony of our witnesses. We

brought to the attention of the Court men of standing in this community, men whom everyone knew; while the complainant, like one which did not want its ways known, travelled 3000 miles for its testimony and brought that here. The evidence is worse than worthless. Let us examine it.

James Lay has used the Bitters for eighteen years. He is a witness who has testified three or four times, and got \$2.50 each time. He seems to have divided this good thing with his friend Finn, another witness; Lay first told Finn to use the Bitters, and Finn has since testified twice.

Marinus has taken the Bitters for eighteen or twenty years. He says, with beneficial results; but it does not appear that he ever got rid of his indigestion.

William T. Fickett took it for a weak stomach and nausea in the morning. We believe that those symptoms arise from over-indulgence in alcoholic stimulants, He seems to believe in a cure by the hair of the dog that bit him. Fickett testified once before.

Reynolds had used the Bitters generally for indigestion for eighteen or twenty years. Evidently if he took it for that length of time it did little good. He is in the employ of the Hostetter Company and has testified in five or six cases of which he can recollect.

Becker testifies to having used the Bitters for ailments of the liver and stomach, also for dysentery. This is the same medicine which is advertised as a cathartic! Becker first heard of the Bitters while he was in the saloon business where he had to get it for

several of his customers, one of whom was a Major Renshaw. Becker received \$3 for previous testimony.

Charles Schlich, a Brooklyn barber, says it is good for kidney trouble. The Bitters were prescribed for him by John Malster *who was in the liquor business*. Schlich had previously testified.

Edwards has testified several times and made \$10 or \$15 out of the appellee.

Ramsey testified twice at \$10 a trial.

Allan Russell is an engineer. He has used the Bitters for seven or eight years as a stimulant, after cleaning fires or heavy work in the engine room. He says he does not drink liquor, and probably uses the Bitters instead. Russell has testified three or four different times.

These are the users of the complainant's Bitters and any reading between the lines of the testimony of these stock witnesses will show that they knew nothing of the contents or intrinsic value of the Bitters and simply used it as an alcoholic beverage or stimulant. Their testimony as to the medicinal properties of the Bitters is worthless, in fact, so is all their testimony.

The testimony of the physicians examined by complainant is not more valuable.

Dr. Golding became acquainted with the Bitters while he was a boy. He does not know the composition of the Bitters, and yet deliberately testifies, in answer to direct interrogatory 15, that there is nothing false or misleading in the directions on the label. In answer to interrogatory 16, he states his reasons for his opinion

of the Bitters to be that they have stood the test of time; that they have been in use for a long number of years and continue to hold their prestige, and that they are put up by a reliable firm. Certainly a strange statement from a physician who has no knowledge of the ingredients of the medicine. The ethics of the profession forbid the prescribing of any preparation, the formula of which is not disclosed and all legitimate proprietary articles have the formula on the labels. His testimony that the Bitters would not be deleterious to the person suffering from the disorders named in the label is certainly to be suspected when he does not know the amount of alcohol. He states emphatically that he regards the Bitters as a medicine when he does not know the composition. On cross-examination the answers of the witness do not show that candor which a professional man should exhibit. His answers as to the conditions under which alcohol is contra-indicated do not begin to cover all the conditions. There is a studious avoidance of those connected in any way with the ailments described on the label. The interrogatories directed to the circumstances under which he has prescribed, and those under which he would not prescribe, the Bitters, are not half answered. He testifies that the use of alcoholic stimulants will produce no irregularities, though the abuse will, but what are use and abuse, he does not say. As a crowning exhibition of inconsistency, he says that he would prescribe Hostetter's Bitters for a patient suffering from loss of appetite arising out of the abuse of alcoholic stimulants, and yet this man testified that he had used the Bitters in cases of tuberculosis, pneumonia and typhoid fever, the

very cases where a highly alcoholic stimulant is necessary. He had even prescribed it for rattlesnake poisoning, and yet would give this same stuff to a patient suffering from irregularities brought about by the use of alcoholic stimulants! There is further evidence of Dr. Golding's disingenuous testimony. In answer to direct interrogatory 30, he answered (Tr. p. 482):

“Wormwood is, as we understand it in medicine, a drug of the pharmacopoeia, the leaves and tops of artemisia absinthium. It contains volatile oil of wormwood, bitter principle, and other constituents. Wormwood is, therefore, a medicine. Absinthe is a cordial containing a small percentage of volatile oil of wormwood and various other constituents. It is not a medicine.”

To contradict Dr. Berndt, Dr. Golding testified in answer to direct interrogatory 33 (Tr. pp. 417, 418, 482) that Falkenau's analysis showed a medicine where Dr. Berndt had said it was an alcoholic stimulant. But the analysis is identical with Dr. Golding's definition of absinthe contained in his previous answer, “Absinthe is a cordial containing a small percentage of volatile oil of wormwood, and various other constituents. It is not a medicine.” Hostetter's Bitters is a cordial containing a small percentage of volatile oil of wormwood and various other constituents. But Dr. Golding says this *is* a medicine. After this exhibition of inconsistency, we are not amazed to learn that Dr. Golding testified once before and got \$25 for it.

Dr. D'Homerque has not been in active practice for years, and was not familiar with Hostetter's Bitters

while in practice. This man is more frank than Dr. Golding. He has never prescribed the bitters for fever and ague or liver complaint, nor for Bright's disease or nervous complaints. He admits that alcohol is contra-indicated in cystitis (inflammation of the bladder) gastritis (inflammation of the stomach) or peritonitis (acute inflammation of one of the abdominal membranes) also inflammation of the bowels, inflammation of the walls of the stomach, and any of those kinds of diseases. He would not prescribe it for inflammatory rheumatism. (It will be noticed that the directions on the bottle make it applicable to many of these diseases.) This physician does not know the ingredients of the Bitters. He testified twice before. This testimony is favorable to defendants and we honor the man who had the courage to tell the truth on cross examination.

Dr. Adolph Wieder is another physician who is willing to prescribe medicine without knowing what he is prescribing. The answers to cross-interrogatories show the same bias noted in Dr. Golding's testimony. He says the places where alcohol is contra-indicated are in "epilepsy, or cerebral hemorrhage where there is a "comatose condition and bounding pulse". But his answers to interrogatories 9, 10, 11, 12, show that the doctor prescribes the Bitters only as Dr. Williamson and Dr. Berndt would prescribe alcohol, in cases of extreme prostration. He has prescribed it in malarial diseases of the tertian form, abscesses of the liver, degeneration of the kidneys, last stage, and Bright's disease (the latter presumably after the case was hopeless).

The doctor admitted, however, having prescribed it for copper snake bite with beneficial results. This is a sufficient admission of its alcoholic nature, and, yet, he further says that he would prescribe Hostetter's Bitters in irregularities brought about by the use of alcohol. Wieder testified once before.

Dr. Ruppel frankly admits that he would prescribe some proprietary medicines, the formula of which is not known, provided they are placed on the market by a reliable concern. Probably he would advertise in the daily papers. The cross-interrogatories show, however, that the prescriptions are fairly in line with the use of alcohol as outlined by defendant's physician. The doctor would prescribe Hostetter's for atonic dyspepsia, malarial diseases, intermittent malarial fever; but has not prescribed it in acute malarial diseases nor in Bright's disease of the kidneys. The doctor testified once before for the company. He, too, would give the Bitters for loss of appetite following alcoholic excesses.

Dr. Pfungsten asserts that a dose of Hostetter's Bitters should be a two ounce wine glassful. He admits, however, that a Rhine wine glass contains $2\frac{1}{2}$ times as much, and that sherry wine glasses are recognized in the profession, and that he is also familiar with Rhine wine glasses and champagne glasses. The doctor asserts that alcohol is contra-indicated in some diseases of the nervous system, and in some diseases of the stomach; also in some diseases of the intestines, like typhlitis, peri typhlitis and in acute Bright's disease, thus substantiating our witnesses and contradicting some of the other witnesses of appellee. One would

think, in the face of this, that he did not know the quantity of alcohol it contained, and yet, he admits that he gives Hostetter's Bitters with quinine, and would give it to a patient suffering with alcoholic excesses in preference to any other preparation.

To read the evidence of these physicians is to be convinced that "they are not their own, they are bought "with a price". We cannot imagine that a reputable physician would stultify himself and prostitute his profession by prescribing a remedy of whose ingredients he knows nothing and prescribe it where alcohol is contra-indicated, when the compound is one-half alcohol. There is nothing in such testimony to shake the forceful vigor of the evidence of our own witnesses.

It must be constantly borne in mind that none of these physicians who testified for appellee knew the quantity of alcohol in these Bitters, hence did not know what they were talking about. Appellee carefully kept this from the witnesses, claiming that our analysis was "pushed up" to show greater alcoholic strength and asserting there was less than we showed. So there is actually no evidence going to contradict our evidence of the pernicious effect of the great volume of alcohol in these Bitters upon the very diseases they are advertised to cure. The Bitters are a poison in the guise of a panacea. The argument that these Bitters are not an alcoholic stimulant, commencing on page 6 of Appellee's Brief, is forceless. It is based on the evidence of physicians and others who do not know the composition of the Bitters, nor their amount of alcohol. Of what value is such guess-work? But in the face of the un-

controverted evidence that the Bitters are 43% absolute alcohol, even the pertinacity of counsel could not continue forever, and on page 27 of the Brief we find: "The intoxicating qualities of alcohol are overcome, if not wholly, at any rate partially, by the presence of "other drugs." So it is finally admitted that the pernicious effect of the alcohol is only partially overcome. The proof, however, shows it is not overcome at all, and cannot be. The experience of the witness Robbins (Tr. pp. 357-362), and the experience of every one who ever drank these strongly alcoholic Bitters, is conclusive.

Is any argument necessary to show that such a medicine (?) advertised to cure diseases on which the effect of alcohol is disastrous, is a fraud on the public? Imagine a man with indigestion or dyspepsia brought about by an inflamed condition of the stomach, a man suffering from a disordered digestion brought about by the excessive use of alcohol, a man the victim of kidney, liver or bladder trouble, or a woman, under any circumstances, being told to take a wineglassful of whisky three times a day before meals, four times the usual drink of whisky! Yet Hostetter's Bitters are worse than whiskey for they contain as much alcohol, but in a cruder, rawer, more virulent state, absolute spirits. If appellee wanted to be frank and fair and to produce direct evidence, why did it not ask its physicians what would be the effect of this amount of alcohol on the diseases it advertises its Bitters to cure instead of asking them whether Hostetter's Bitters would be harmful and at the same time concealing the quantity of alcohol in

the Bitters? It did'nt dare. It simply evaded the issue. If alcohol was good for those diseases, if Hostetter's Bitters were good, why did complainant contend that a wineglass contained only two fluid ounces instead of the well known four?

But let me return to Appellee's Brief. On page 12, we read:

“ It is respectfully submitted that, in order to exclude the appellee herein from protection against the fraudulent acts of the appellant, it must be clearly shown that the appellee is guilty of fraudulent conduct toward the public; that it must be a fact known to the appellee as false, material to the public, and that the appellee has no reasonable ground to believe the statements made to be true, and no reasonable excuse for the statements.”

It is admitted, then, that a complainant whose conduct is that last quoted is not entitled to equitable relief. Is not this precisely the conduct of this complainant?

But appellee continues:

“ In this case the appellant seems to confine its proofs to these statements: That appellee's Stomach Bitters are an article intended to deceive the public; that the partaking of them is injurious to the public health; that their representations upon the labels, with advice or directions thereon given to persons suffering from numerous ailments, are false, and known by appellee to be false.”

What further proof is necessary? Do not the proofs described in the latter quotation exactly fulfill the con-

dition described in the former? It seems to us that the appellee has admitted itself out of Court.

The Best Evidence.

We assert again: If appellee's Bitters are medicinal and it wants to prove that fact, it must produce the best evidence, the formula. Counsel assert that this contention is not made in good faith, that it is offered only in the hope of obtaining the formula to be used in appellant's business. Such puerile evasions of the question are ridiculous. What does the appellant want with the formula? It is already known to all drug dealers and liquor men. In one case, appellee's two spies, during the hearing before the examiner, were confronted with samples, and could not tell that of the appellee from that of the defendant, although they pretended to be experts. Appellant sold these Bitters as an alcoholic beverage, did not claim it as a medicine, and yet even an expert cannot tell the Bitters it sold from those sold by appellee. In every case the spies swore the two articles were similar in color, taste and smell. Moreover, neither appellant nor any of the defendants in the other cases made any special point of selling Bitters. They were not even a staple article of sale. Under all these circumstances, how could appellant be commercially advantaged by obtaining the formula? The argument of appellee is preposterous. If there is any medical virtue in the compound, let its makers disclose it. They won't reveal the formula, because they know the revelation would show that they are vending a mere alcoholic beverage, and no medicine, and the "hope of their gain" would be gone. Every

reputable formula is disclosed—witness that of alka lithia, to which the Court's attention was called during the argument.

Chief sale of Hostetter's Bitters is as alcoholic beverage.

This brings us to the main purpose of this suit. It is common knowledge that Hostetter's Bitters are found on every bar, that they are sold constantly as alcoholic liquor, that the bulk of the business of appellee is done through liquor houses, and not through drug stores. If the highly virtuous appellee is engaged wholly in the humanitarian occupation of ameliorating the sufferings of mankind by vending a valuable medicine, why does it object to the appellant in this action selling its own Bitters as a beverage? What harm could come to it from the competition of liquor men? Do men go to a liquor store for medicine? Why didn't these spies go to a drug store? Because appellee is in the liquor business. Because it is liquor business it is after. We asked the witness Morrison (Tr. p. 142):

"Q. 49. How did you come to visit the store of the "defendants on the 30th day of March, 1899?" and the answer was "I knew it was a wholesale liquor house".

It was liquor men's competition they were endeavoring to suppress. And in the face of this, appellee has the effrontery to try to make this Court believe that it is not vending an alcoholic stimulant, that it is not perpetrating a fraud on the public. It even tells its victims to take less than the prescribed doses at first, gradually increase it, the very way alcoholic drinks are taken. It knows a teetotaler couldn't stand so much alcohol at first. It knows the result would disclose its

chief ingredient. It knows how to fasten its tentacles gradually on its victim.

By claiming that this is a medicinal compound, appellee is escaping the liquor tax imposed by the Internal Revenue Laws of the United States, and the local taxes.

Hostetter vs. Adams, 10 Fed. 841.

Is it any wonder that appellee fights hard to keep us from proving that it is vending an alcoholic stimulant, defrauding the people and even the United States government?

On the inside page of the front cover of the Hostetter Almanac for 1901 is the following:

“The public should also beware of the local bitters attractively labelled and sold as ‘appetizers’ and ‘stomachics’. The injury inflicted upon the stomach by these drams in disguise is irreparable. They are composed of cheap and fiery spirits, with some bitter extract infused for flavoring, and in consequence of the low price at which they are sold, enjoy the patronage of impecunious imbibers.”

“Impecunious imbibers”! Could plainer words be chosen to show the commercialism of the present crusade of the Hostetter Company? Could there be more convincing evidence that it is itself in the liquor business, and endeavoring to keep others out? Is not the analysis of Hostetter’s Bitters we have produced the exact counterpart of the Bitters above characterized as “appetizers” and “stomachics”? Is not a liquor composed of 44% alcohol, water, and some 4%

bitters and flavoring extracts exactly one "composed of " cheap and fiery spirits, with some bitter extract in- " fused for flavoring"?

Complainant makes much ado about the great length of time its Bitters have been before the public, the number of times it has been protected and the novelty of this defense. But because it has grown gray in iniquity is no reason the iniquity shall continue. The novelty of this defense is not material. It may be new to this complainant, but it is old in equity. Because no litigant ever used it in a Hostetter case before is no drawback to its efficacy now. We are not responsible for the laches of others. We used the defense at the first possible opportunity and purpose establishing it. According to appellee's argument, the United States Government had no right to abolish slavery, having tolerated it for years. The argument is on a par with the Bitters it is meant to defend.

There was some contention that the public ought to know that the Bitters were alcoholic, because the word "Bitters" was notice of that fact. This is no consolation for appellee, even if true, for the amount of alcohol is not stated, and no sane man would expect to find medicine as strong in alcohol as a drink of whisky, or a whisky cocktail. But "Bitters" is not medicinally indicative of alcohol. On page 338 of the Transcript, Dr. Williamson is recorded as saying, "If I were giving a bitters, " whether wormwood or quassia or gentian, or any " other recognized bitters, I would prefer to give it in " some other form than alcohol." This is the only evidence on the subject, and it is all our way. There are

all sorts of bitters, and this talk about the necessity for an alcoholic menstruum is all nonsense. The only necessity for alcohol is to enable the appellee to sell intoxicating liquors as medicine to defraud the public, and the Government, and to make money by misrepresentation.

While speaking of alcohol in the Bitters, we may as well animadvert to the efforts of counsel to make it appear less than it really was (why did they try this if alcohol was not injurious in the diseases the Bitters were advertised to cure?). The amount of alcohol by volume as shown by the analyses of Falkenau, Curtis and Prof. Price is between 43% and 44%. Dr. Golding tried to make this amount appear to be less, and succeeded in making it apparent that he was trying to deceive the Court. Otto Wuth, for the complainant, testified to 35%. The Curtis analysis contains the following: "Alcohol *by volume* (including volatile oil or "worm-wood) 43.110%." This analysis is defendant's Exhibit 3 and a copy of it was submitted to Dr. Golding with complainant's interrogatories. Dr. Golding, however, is the only man to whom an exact copy was submitted. In interrogatory .17, addressed to Dr. D'Homerque, and in interrogatory 11 submitted to Otto Wuth only a garbled synopsis is submitted, the first line of which is "consists of 43.110% of pure alcohol". In the interrogatory a quotation mark preceded these words, and the whole professes to be an exact copy of the analysis. The words "by volume" were purposely eliminated. An examination of the Wuth analysis tells why. It says, "Alcohol 35%", and in answer to

interrogatory 10 Wuth says, "The determination made by me of the alcohol in these Bitters is absolutely correct, and is 35% not 43%". Mr. Wuth's analysis has been deceitfully caused to show 35% without showing whether by weight or by volume. Undoubtedly it was by weight, as that corresponds practically with Prof. Price's analysis by weight. The report by Wuth of his analysis is dated Sept. 22, 1900, and the analysis itself was undoubtedly made previously. The application for a commission was made October 1st, 1900, and the interrogatories were handed up September 29th. The Wuth analysis was made, then, before the interrogatories were submitted, and, doubtless, before they were prepared, for Mr. Clarke says in his affidavit made September 17th, filed with the petition for a commission, "That the delay in submitting the interrogatories has been caused by the inability of affiant to converse with some of the witnesses as to be able to formulate the interrogatories or to know to what a witness could testify in rebuttal." Mr. Clarke knew, then, before preparing the interrogatories, the discrepancy between the Wuth and Curtis analyses, and the reason therefor, yet he wilfully omitted to make this known to Dr. Golding, sought evidence from him to show that the amount of alcohol had been "pushed up" when he knew it had not been, concealed from Dr. D'Homerque and Mr. Wuth that the alcohol in the Curtis analysis was "by volume" and, in the Circuit Court, charged that the Bitters analyzed by Curtis and Falkenau had been tampered with by pouring out one-half of the quantity and refilling the bottle with alcohol.

Now, then, we have the explanation of the garbled analysis submitted to Dr. D'Homerque and Mr. Wuth. Nothing is said to them about volume, and Mr. Wuth received his instructions to determine the amount of alcohol by weight. Appellee took care that it should not appear that the amount was determined by weight, and it was not apparent to Mr. Wuth that our analyses had been "by volume" because those words had been eliminated. The complete analysis was submitted to Dr. Golding, the first of the witnesses examined, as a mark of good faith, and it was not likely that thereafter the garbled analysis would be particularly noticed. The appellee then brings this evidence to the Court, and submits the Wuth analysis as having been obtained under circumstances analogous to our analyses, but exhibiting a striking discrepancy, and it remained for Professor Price's testimony to throw a flood of light on the mystery. The conclusion that this evidence was manipulated for the purpose of deceiving the Court is irresistible. In the light of this inexplicable conduct in connection with these analyses, it certainly seems that the conduct of counsel should be closely scrutinized, and if there is one such flagrant attempt to impose upon the Court, it is not improbable that there are others. Good will towards counsel gives way to suspicion, and where a doubt should have been resolved in his favor it must now be taken against him. It is fair to presume that these twelve or more depositions, all of which are in *haec verba*, although one was taken a month after the others, and most of which were taken the same day and the same hour, were no depositions at all, but simply copies of previous depositions taken

some time before, or even not taken at all—simply manufactured for the occasion. They bear intrinsic evidence of manufacture. Counsel who was present at their taking does not offer to explain all this, and where he has shown himself equal to deceiving the Court in one respect, he must take the consequences in others. It will, therefore, be further presumed that the inferior evidence as to the Hostetter Company's succession to the rights of David Hostetter was introduced because better evidence would have been adverse, or because there was no sufficient evidence.

All these matters were brought to the attention of counsel in the Circuit Court. The man who took the deposition was present, and made no effort, no attempt, to explain why they were carbon copies one of another, made no attempt because there was no possible explanation. We charged him with fraud in attempting to mislead the Court as to the quantity of alcohol in the Bitters and he was silent. As Cicero said to Cataline we might say to him, "*Quid Taces?*". Still he would not reply, and for the same reason. He knows his guilt. The criminal audacity, the utter recklessness of appellee and its counsel, is startling. It positively shocks the moral sense. That a Federal Court of equity can be wilfully imposed upon and no attempt made at explanation is incomprehensible. We have always been taught that our Federal Courts were the great bulwarks of American institutions, that they were worthy of all admiration and respect, but it seems that the commercialism of the age spares not even our best and dearest, that it

invades the sacred precincts of our most cherished institutions and destroys the ideals of our profession, and tries to drag the practice of the law to the meanest bargain-counter.

Equity will not protect a quack medicine.

We took this up in our Opening Brief, cited a uniform line of authorities which asserted the doctrine and were met in Appellee's Brief by what? Not a denial of the doctrine, but a denial that appellee's Bitters was a quack medicine. Either it is a quack medicine or no medicine at all. Perhaps it is both. A quack medicine, according to all the authorities cited in our Brief (p. 26) is one the formula for which is not disclosed. Can words be plainer? Is the Hostetter formula disclosed? No. Is not Hostetter Bitters, then, a quack medicine? To establish the contrary appellee cites no authorities (Brief p. 5), but introduces the evidence of various doctors, whose testimony has already been commented upon. The "quackness" of this article is a question of law, not of opinion, and the opinions of men who do not know the composition of the article cannot carry any force.

Why should equity protect that about which it knows nothing? Why should a man be allowed to say I want you to protect this article, but I won't tell you what it is? There are quacks, charlatans and impostors enough without the assistance of equity.

The Federal Courts hold a power which is mighty for good in the dealing with iniquity. They may work wonders in suppressing fraud, preventing the practice

of medicine without a license, stopping the exploiting of human life, putting an end to endless imposture and villainy. We have confidence that the Federal Courts are alive to this, and that they will assert themselves to the great gratitude of a long-suffering public.

In Mr. Clarke's counter-statement he said, speaking of the failure of the defendants, in the other cases, to appeal, "All save Samuel *seemed* contented." Contented! They did not appeal, because of the small amount of money involved, and the large expense of appealing, because appellee had not the courtesy to stipulate that the other cases should abide the appeal in one, or that only one transcript need be filed. But all resented appellee's hollow victory, and all applauded the appeal which was to secure a vindication of the defendants and the exposure of the iniquity of appellee's insidious article. As the solicitor for one non-appealing defendant said, "I am glad to see that the defendant " in one of these actions has the nerve, the independence " and the public spirit to fight this matter out to the " last. I am glad it is not going to give up simply " because there is not much money involved and it " does not care whether they sell the bitters or not. " All the defendants are with them in spirit. I am " glad that it is not going supinely to let a wealthy " corporation call reputable business men frauds and " impostors where the frauds, cheats and impostors are " all in the complainant's own Company. I feel con- " fident that you will win out, and you may command " my assistance in every possible way. This is an " opportunity for doing the whole United States a

“lasting and valuable service. The iniquity of the
 “patent medicine fraud is a National curse. Some
 “quack puts up a compound and advertises it broad-
 “cast. The unsophisticated read the advertisements,
 “dwell on them, and begin to imagine themselves af-
 “flicted with the premonitory symptoms of the various
 “distressing diseases so artfully described. Let
 “the mind become doubtful, and the health of the body
 “is instantly affected. Then the quack reaps his har-
 “vest. Imagine a compound 44% of which is crude al-
 “cohol, the rest of the liquid water, and about 4% of
 “the commonest drugs and flavorings, being called a
 “medicine, and being sold for \$1.00 a bottle! It is
 “preposterous. It is villainous. It is liquid poison. It
 “is slow murder.”

We cannot endorse these strong words too heartily. Read the ingenuity with which the Hostetter Almanac is written up, note the number of diseases described and described in an insidious way to make the readers think they are being smitten. Then look at the deposition of John B. Crooks (Tr. p. 42) and bear in mind that during the last 27 years from nine to twelve million copies annually, in nine different languages, beside a flood of newspaper advertisements (Tr. pp. 594-597), have been strewed all over the country. And what has been the harvest? To the credulous readers, disappointment, wrecked health, poison, misery, drunkenness. Crook's testimony on the magnitude of appellee's advertising was introduced by appellee, in boasting of its strength, its stability, its activity. Boasting? Yes, but of what? Of its shame, of its power for evil,

of its capacity for villainy, of its opportunity for deception, of its facility for fraud. Can a complainant boast of its shame in a Court of Equity? Can the Federal jurisdiction be invoked to assist such diablery? Shall poison be given to our women and children in the guise of medicine? Shall they be taught to imbibe alcohol in its strongest and most virulent shape, right in their own homes? Shall the foundation be laid for drunkenness and misery where health and vigor is sought? Shall the man who is not strong enough to take alcohol in moderation and must abjure it or fall, be cast into the gutter because he took an apparently innocent dose of what purported to be medicine?

Is this appellee, with its record of wrecked homes, shattered lives, deaths and skeletons, deserving of any equitable consideration? If it wants to go into the liquor business, let it come out into the open, let it sell as others sell and let its product be admittedly alcoholic. The defendants are not temperance men. They are not preaching prohibition. It is their business to sell liquor. But they believe in selling it only to men who can drink liquor and still be men. They are openly and honestly in the liquor business. Buyers of their goods know them to contain alcohol. They do not set a trap for their fellow-men. They do not obtain money under false pretenses. They are not wolves in sheep's clothing. They are not snakes in the grass. They are not exploiting human life. When told their goods contain alcohol, they do not cower like whipped dogs, neither do they claim falsely that the quantity of alcohol has been "pushed up". When they come into

Court they put up a square fight, and do not try to deceive the Court, by producing "fixed" testimony as to the quantity of alcohol in their goods, neither do they claim their goods to be medicinal, and then refuse to disclose their contents.

May it please the Court, We have discussed this case at great length. We have spoken and written in some heat. But we think the importance of this matter justifies us throughout. We have done our duty to our client, and our duty to the public. We feel that it has been a privilege to present this matter to this Court. We think that we shall have had a small hand in checking one of the greatest evils in the country. We envy this Court its opportunity. It is not often that so large an opportunity to do good and to check evil is presented. A decision for appellant will work a world of good throughout this land, and will stand as a precedent which will make quacks hesitate before they "put their money into a bag with holes".

We feel certain that this Court would give an opinion in our favor on the facts, which do not show unfair competition; on complainant's failure to show exclusive right to the word "Hostetter" either from Dr. Hostetter or from Smith, or that any one ever had the exclusive right; also on the injunction which denies us the use of the word "Hostetter" even with proper distinguishing marks. But while we rely upon all these points, it is the public question involved which appeals to our manhood. It is upon this point that we expect the burden of the Court's decision to be placed. We have spared no pains to present it as strongly as

possible, in the hope of benefiting a long suffering and much abused public. We are confident of the co-operation of the Court in this work of righteousness.

We take great pleasure in acknowledging the most valuable assistance of Mr. William M. Gardiner of the San Francisco Bar in the preparation of this brief.

Respectfully submitted,

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Solicitor for Appellant.